IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.10.2006

CORAM

THE HONOURABLE MR.JUSTICE R.BALASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.A.NOS.1248 AND 1282 OF 2004

Mahesh .. Appellant in
CA.No.1248 of 2004
1.Kora Nagaraj
2.Kumar
3.Kadukkan Kumar @ Chandrasekar
4.Raja
5.Zackaria @ Zakir .. Appellants in
CA.No.1282 of 2004
Vs.

State rep. By
the Inspector of Police,
Hosur Police Station,
Dharmapuri District
(Crime No.615 of 2000) .. Respondent in
both the appeals.

These criminal appeals are preferred under Section 374 Cr.P.C against the judgment of the learned I Additional Sessions Judge, Dharmapuri @ Krishnagiri made in S.C.No.178 of 2003, dated 24.09.2004.

For Appellants : Mr.M.S.Kandasamy,
for Mr.G.M.Shankar for A-4
in CA No.1248 of 2004

Mr.V.Gopinath, SC
for Mr.L.Mahendran
for A-2,A-3,A-5 and A-6
Mr.AR.L.Sundaresan, SC
for Mrs.A.L.Gandhimathi for A-1
in CA No.1282 of 2004

For Respondent : Mr.N.R.Elango, APP

COMMON JUDGMENT

(The Judgment of the Court was made by M.CHOCKALINGAM, J.)

The judgment shall govern these two appeals, namely C.A.Nos.1248 and 1282 of 2004. The first one is brought forth by A-4 and the second one is brought forth by A-1 to A-3,A-5 and A-6.

2.The appellants, six in number, have challenged the judgment of the learned I Additional Sessions Judge, Dharmapuri @ Krishnagiri made in S.C.No.178 of 2003, whereby they stood charged as follows:
Charges:
I A-1 to A-6 - S.147 IPC
II A-1 to A-5 - S.148 IPC
III A-1 to A-6 - S.341 IPC
IV A-1 to A-5 - S.302 IPC
V A-6 - S.302 r/w S.149 IPC
VI A-1 to A-6 - S.307 r/w S.149 IPC

Conviction and sentence:

A-1 to A-6 – S.147 IPC – 2 years R.I. and to pay a fine of Rs.5000/- each.
A-1 to A-5 – S.148 IPC – 3 years R.I. And to pay a fine of Rs.5000/- each.
A-1 to A-6 – S.341 IPC – Fine of Rs.500/- each.
A-1 to A-3 – S.302 IPC – Life imprisonment each and fine of Rs.25000/- each.
A-4 to A-6 – S.302 r/w S.149 IPC – Life imprisonment each and fine of Rs.25000/- each.
A-1 to A-6 – S.307 r/w S.149 IPC – 10 yeas R.I. Each and a fine of Rs.5000/- each

All the sentences should run consequently.

3.The short facts necessary for the disposal of these appeals can be stated thus:
a)P.W.1 is the brother of the deceased Balasundararaj. P.W.2 is the son of the deceased, who is aged about 12 years. The deceased was doing chocolate business. One Korababu was indulging in criminal activities. The said Balasundararaj was an informer to the police. Hence, the said Korababu was aggrieved over the same. The appellants were the associates of the said Korababu. On 29.8.2000 evening hours, P.W.1, who was running business in Bangalore, came over to his brother's house and stayed over there. On 30.8.2000 at about 10.45 a.m., after taking food, P.W.1 went to the tea shop. At that time, the deceased and his son P.W.2 were going in a Fiat Car, just crossing him. All the accused came in a Tata Sumo Car, which was marked as M.O.7 and they restrained the deceased. Immediately, all the accused got down from the car with deadly weapons and damaged the Fiat Car of the deceased. Immediately, the deceased stopped the car and tried to escape along with his son. But, it was the first accused, who gave the first blow on the deceased. The second accused and the third accused also attacked him. The deceased fell down. P.W.2 was also attacked by the other accused, who died pending trial. This was witnessed by P.W.1. On hearing the distressing cry, a crowed gathered. All the accused fled away from the place of occurrence along with the weapons of crime.

b)P.W.1 took the injured P.W.2 to the Government Hospital, Hosur, where P.W.15, the Doctor gave treatment to him. He noted the injuries found on him. Ex.P.19 is the Accident Register in this regard.

After treatment was given, he was taken to Bangalore for further treatment. P.W.1 went to the police station, where P.W.22, the Sub Inspector, who was on duty at that time, received the complaint, Ex.P.1. On the strength of the same, a case came to be registered in Crime No.615 of 2000 under Sections 147, 148, 341, 307 and 302 IPC. Ex.P.32, the first information report was sent to the Court.

c)P.W.24, the Inspector, on receipt of the copy of the F.I.R., took up the the investigation, proceeded to the place of occurrence, made an inspection in the presence of the witnesses and prepared Ex.P.6, the observation mahazar a and Ex.P.36, the rough sketch. He has recovered sample earth and bloodstained earth under a cover of mahazar. He proceeded to the Government Hospital, Hosur and conducted inquest on the dead body of the deceased in the presence of the witnesses and panchayatdars and prepared Ex.P.37, the inquest report. Following the same, the dead body of the deceased was sent for the purpose of autopsy along with a requisition.

d)P.W.15, the Doctor attached to the Government Hospital, Hosur has conducted autopsy on the dead body of the deceased and has issued Ex.P.18, the post-mortem certificate, wherein he has opined that the deceased would appear to have died of shock and haemorrhage due to multiple injuries sustained.

e)Pending investigation, the Investigator came to know that A-1, A-2 and A-3 surrendered before the Judicial Magistrate, Pochampalli. On 8.10.2000, A-6 was arrested in the presence of the witnesses. He volunteered to give a confessional statement, which was recorded in the presence of the witnesses. A-4 was arrested in the presence of the witnesses and he volunteered to give a confessional statement, which was recorded in the presence of witnesses and the admissible part of which was marked as Ex.P.5. Pursuant to the confessional statement, he produced a knife, which was recovered in the presence of witnesses under a cover of mahazar. Police custody was ordered in respect of A-1, A-2 and A-3. Their statements were recorded in the presence of witnesses. A-1 to A-3 produced the weapons of crime, which were recovered in the presence of the witnesses under a cover of mahazar. A-5 was also arrested in the presence of the witnesses. He volunteered to give a confessional statement, which was recorded in the presence of the witnesses. Pursuant to the confessional statement, he produced the weapon of crime, which was recovered in the presence of witnesses under a cover of mahazar. All the accused were sent for judicial remand. All the material objects recovered from the place of occurrence, from the dead body of the deceased and the M.Os recovered from the accused were subjected to chemical analysis by the Forensic Science Department. Ex.P.29, the Chemical Analyst's report and Ex.P.30, the Serologist's report were received. The Investigator examined all the witnesses and recorded their statements. On completion of the investigation, he filed the final report.

4.The case was committed to the Court of Sessions and necessary charges were framed. In order to substantiate the charges, the prosecution has marched 24 witnesses and also relied on 37 exhibits and 21 M.Os. On completion of the evidence on the side of the prosecution, the accused were questioned under Section 313 Cr.P.C procedurally as to the incriminating circumstances found in the evidence of prosecution witnesses, which they flatly denied as false. On the side of the defence, no witness was examined, but only one document was marked. On completion of the evidence on both sides, the lower court heard the arguments advanced by both sides and also scrutinised the materials available and took a view that the prosecution has proved the case beyond reasonable doubt and has found the accused/appellants guilty and has awarded punishment as referred to above. Hence, these appeals at the instance of the appellants. 5.Advancing his arguments on behalf of the appellants, the learned Senior Counsel Mr.V.Gopinath would submit that in the instant case, the prosecution has miserably failed to prove the case; that according to the prosecution, P.W.1 is the brother of the deceased and he is running a business in Bangalore and he came to his brother's

house on 29.8.2000; that according to him, he has stated in the F.I.R. that he came for the purpose of consultation with his brother about the business, but before the Court, he has stated that he came for the purpose of getting money and hence, his evidence that he came from Bangalore on 29.8.2000 and stayed in his brother's house and in the next morning, he went to get money from his brother cannot be believed.

6.Added further the learned Senior Counsel that there are three eyewitnesses; that the evidence of P.W.3 did not support the prosecution case; that P.Ws.1 and 2 are the eyewitnesses; that it is highly doubtful whether the first information report has come into existence as put forth by the prosecution; that the occurrence has taken place at about 10.45 a.m.; that the first information report has come into existence at 12.00 noon; that the intervening circumstances was that P.W.2 was taken before the Doctor; that according to P.W.15, the Doctor, who admitted P.W.2 in the hospital, P.W.2 was conscious; that if to be so, there was no impediment for the Investigator to record the statement of P.W.2, but the statement of P.W.2 was not recorded; that the statement of P.W.2 under Section 161 Cr.P.C was recorded only on 4.9.2000 and thus, some delay is noticed; that this delay would go to show that whether the version of P.W.2 could be believed; that in the instant case, in respect of six accused only, the trial was going on; that the other two accused, whose names were mentioned in the first information report, died pending trial; that from the evidence available, there is no material available pointing to the guilt of A-4 to A-6; that the names of A-4 to A-6 were not mentioned in the first information report; that P.W.1 has given the names of A-1 to A-3, but he has not mentioned the names of A-4 to A-6; and that even P.W.2, in his evidence, did not implicate A-4 to A-6.

7.Added further the learned Senior counsel that identification parade was conducted, but P.W.2 did not participate in the same; that P.W.1 has participated in the identification parade and he has identified A-4 and A-5; that the identification parade was conducted only on 23.11.2000; that the police claims that the accused were arrested on 8.10.2000 itself and thus, there was a long delay, which remains unexplained; that when all the accused persons were produced before the Magistrate for identification parade, they have made a complaint that they were all shown to the witnesses already; that the accused were shown to the witnesses before the identification parade would be suffice to reject the identification parade proceedings.

8.Added further the learned Senior counsel that in the instant case, the lower court has accepted the part of the evidence as to the arrest of A-6, confessional statement and pursuant to the confessional statement of A-6, M.O.7, Tata Sumo Car was recovered; that according to the prosecution, this was the Car, in which all the accused persons were travelling armed with deadly weapons and they restrained the Fiat Car, in which the deceased was travelling; that according to the prosecution, the Car was seized only on 8.10.2000, pursuant to the confessional statement made by A-6; that according to P.W.10, who is the owner of the vehicle, the car was taken from him on 29.9.2000 itself; that the evidence of P.W.10 would be suffice to destroy the case of prosecution as to the alleged confessional statement of A-6 and the recovery of Tata Sumo Car.

9.The learned Senior Counsel Mr.AR.L.Sundaresan, in his sincere attempt in assailing the judgment of conviction and sentence against the accused would submit that according to P.W.15, the Doctor, P.W.2 was conscious, but, his statement was recorded only on 4.9.2000; that he was 12 years old; that if to be so, he claims to be knowing all the accused persons even on earlier occasion, which by itself cannot be believed; that the occurrence has taken place at about 10.45 a.m.; that the first information report has reached the Court at 1.45 p.m.; that the Constable, who carried the first information report, has stated that he took the same first to the Deputy Superintendent of Police and then, proceeded to the Court; that there was intervening hours for about 3 hours; and that within that time interval, P.W.1 was summoned from Bangalore to give a report implicating all the accused

falsely.

10.Added further the learned Senior counsel that in the instant case, there is evidence of P.W.13, V.A.O. and P.W.12, the Assistant to the effect that both of them were very well available in the police station and a report was given by them to the effect that there was a murder and thus, this was the information reached the respondent police station at the earliest, but this information was suppressed and not produced before the Court; that the information what is now produced before the Court under Ex.P.1 was not the first information, which was the subsequent developed version in order to suit the prosecution case. Added further the learned Senior Counsel that the shirt of P.W.1 was bloodstained, but the same was not recovered by the police for the reasons best known to them; that the non recovery of the same would indicate that P.W.1 could not have been in the place of occurrence to witness the same; that in the instant case, materials were not available against A-1 to A-3 and they were falsely implicated and under these circumstances, they are entitled for acquittal in the hands of this Court.

11.Heard the learned Additional Public Prosecutor on the above contentions. This Court has paid its anxious consideration on the submissions made.

12.The fact that one Balasundararaj, the brother of P.W.1 and the father of P.W.2, was done to death in an incident that took place at about 10.45 a.m. on 30.8.2000 in a public place was not disputed by the appellants/accused. At the outset, it is to be pointed out that in the instant case, the prosecution relied on the direct evidence by examining three witnesses, namely P.Ws.1 to 3. P.W.3 has turned hostile. Out of three witnesses, P.W.2 was not only an eyewitness, but also an injured witness. It is needless to say, in a case like this where the prosecution comes forward with the evidence of an eyewitness, who is also an injured witness, unless and until strong circumstance or reason is brought forth, the Court should not discard the said evidence. In the instant case, P.W.2, though aged about 12 years, has clearly claimed that he knew the accused persons. Apart from that, he was taken to the hospital immediately within half an hour. P.W.2 has stated before the Doctor that when he was travelling in a car, he was attacked by the accused persons. The Doctor, who has medically treated him, has also certified that he was conscious enough to speak so. Therefore, the earliest document, namely the Accident Register, would clearly indicate the truth of the case. At this juncture, insofar as P.W.2 was concerned, the Court is unable to see any reason or circumstance to reject or to doubt his testimony.

13.Insofar as P.W.1 was concerned, he came to his brother's house on the previous night and stayed over there. According to P.W.1, on the date of occurrence, he was going to tea shop for having tea and at that time, his brother and P.W.2 were going in the Fiat Car. All the accused, eight in number, were coming in a Tata Sumo car with deadly weapons and they have attacked the deceased. Now, at this juncture, as could be seen from the available materials, the Court has to agree with the learned Senior Counsel appearing for A-4 to A-6 that the materials placed before the Court will not be suffice to hold that they are the assailants or there was any nexus between those accused and the crime. Insofar as P.W.2 was concerned, he was the person, who gave information, but he did not implicate A-4 to A-6 when he gave evidence. P.W.2 did not participate in the identification parade. Insofar as P.W.1 was concerned, it is true, he identified A-4 and A-5, but this cannot be a reason to accept the case of prosecution, since insofar as identification parade was concerned, in a given case, it cannot be given any evidentiary value for the simple reason that the prosecution claims that the accused persons were arrested on 8.10.2000, but identification parade was conducted only on 23.11.2000 and thus, there was some delay noticed. This Court is of the considered opinion that this delay itself would be suffice to reject that part of the evidence as to the identification parade. In the absence of the same, the prosecution did not place any convincing material to accept the case of prosecution as far as A-4 to A-6 are concerned. Apart from that, the names of A-4 to A-6 did not find place in the

first information report. This added circumstance would go to show that insofar as A-4 to A-6 are concerned, the Court has to necessarily reject the case of prosecution.

14.Insofar as A-1 to A-3 are concerned, the Court has to necessarily accept the case of prosecution, since the Court is able to see sufficient evidence. P.Ws.1 and 2 are the eyewitnesses to the occurrence. P.W.2 is an injured witness also, as stated above. The F.I.R. has come into existence within a short while, wherein the names of A-1 to A-3 were mentioned. The occurrence has taken place at about 10.45 a.m. P.W.2 was examined by P.W.15, the Doctor at about 11.10 a.m. The F.I.R. has come into existence at about 12.00 noon and the same has reached the Court at about 1.45 p.m. Thus, without any delay, it has reached the Court. All the above would go to show that any embellishment or improvement in the case was not at all possible. The contention of the learned Senior Counsel that the time interval is about 3 hours and within which time, P.W.1 was summoned from Bangalore and on his coming, the report was prepared to suit the convenience of the case and all the accused persons were roped in, cannot be accepted at all.

15.It is true, P.W.1 is the brother and P.W.2 is the son of the deceased. The Court is mindful of caution that their evidence must be looked into with care and caution. If that test is applied, the Court is satisfied that it inspired the confidence of the Court. In the F.I.R., the names of A-1 to A-3 have been mentioned and their overt acts have also been spoken by both P.Ws.1 and 2 and they have given a graphic narration of the same. Thus, the prosecution has proved the case that A-1 to A-3 armed with deadly weapons, came to the place of occurrence, attacked the deceased and caused his death instantaneously. Insofar as the other provisions are concerned, the prosecution is unable to show any unlawful assembly and there is any common object. A-1 to A-3 armed with deadly weapons came to the place of occurrence and attacked the deceased and caused his death instantaneously. Thus, it would be clear that their act was intentional and it would attract the penal provisions of murder. Hence, they were convicted under Section 302 IPC. In respect of the other provisions, this Court is unable to see either factual or legal evidence to connect the accused with the crime. Insofar as A-4 to A-6 are concerned, they are entitled for outright acquittal. Insofar as the charge under Section 307 IPC is concerned, according to P.Ws.1 and 2, the injuries were caused by one of the accused, who has died and the same has become abated. Insofar as the unlawful assembly is concerned, no one of the accused could be saddled with the liability.

16.Under these circumstances, the judgment of the lower court finding the accused Nos.1 to 3 guilty under Section 302 IPC is sustained. In all other respects, the judgment of lower court is set aside. A-1 to A-3 are acquitted of the other charges levelled against them and the fine amounts paid in that regard will be refunded to them. In respect of A-4 to A-6, they are acquitted of all the charges levelled against them. A-4 to A-6 are directed to be released forthwith unless their presence is required in connection with any other case. The fine amounts, if any paid by A-4 to A-6, shall be ordered to be refunded to them.

17.In the result, C.A.No.1248 of 2004 is allowed and C.A.No.1282 of 2004 is partly allowed.

To

1.The Additional Sessions Judge,
Dharmapurai
at Krishnagiri.

2. -do- through the Principal Sessions Judge,
Krishnagiri.

3.The District Collector,
Krishnagiri.

4.The Director General of Police,
Chennai.

5.The Public Prosecutor,
High Court,
Madras.

6.The Superintendent,
Central Prison,
Salem.

7.The Superintendent,
Central Prison,
Vellore.

8.The Inspector of Police,
Hosur Police Station,
Dharmapuri District.